BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALICE M. SINN	)	
Claimant	)	
VS.	)	
	)	Docket No. 201,454
TRANS UNION	)	
Respondent	)	
AND	)	
	)	
SEDGWICK JAMES OF MISSOURI, INC.	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on February 16, 1998. The Appeals Board heard oral argument September 11, 1998.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared on behalf of claimant. Kirby A. Vernon of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for a 35 percent work disability. Respondent contends claimant has not proven she suffered permanent injury arising out of and in the course of her employment with respondent. Respondent argues that any permanent injury resulted from a subsequent injury while working for a different employer.

Respondent also argues that even if claimant does have a permanent injury from her employment with respondent, claimant is not entitled to a work disability. Respondent gives two reasons: (1) respondent contends claimant has no work restrictions from the injury which occurred while working for respondent and (2) respondent contends claimant was terminated

for cause, not for reasons related to her injury. Both reasons, respondent argues, require that any award given be limited to functional impairment.

Whether claimant met with personal injury arising out of and in the course of her employment and the nature and extent of disability are the issues on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to award 32 percent work disability.

Findings of Fact

1. Claimant injured her low back April 7, 1995, when she bent down to pick up one of the boxes she had been directed to move as part of her duties for respondent.

2. Claimant reported the injury on the day it occurred, a Friday, and went to her family doctor, Dr. Mark N. VinZant, Saturday morning. Dr. VinZant prescribed physical therapy. Claimant testified she was released June 28, 1995. Dr. VinZant diagnosed mechanical low back pain due to tendonitis with myalgias. He rated her impairment as 5 percent of the whole body. He gave claimant temporary restrictions of no more than four hours of work daily and no lifting over 15 pounds. He testified he did not expect these to be permanent restrictions.

3. Respondent terminated claimant on the day of her injury. Claimant testified that she was terminated for something she had done before the day of her injury. She claimed she was terminated for the way the movers had moved the boxes. She explained the movers had moved the boxes into storage. She had been responsible for color coding the boxes by date and alphabetically.

4. Claimant soon obtained part-time employment with Dillon's. She began there June 25, 1995, at $5 per hour. By the time of the regular hearing held in this case on October 2, 1997, claimant had left Dillon's and was working for the Wichita Clinic. She worked there 29 to 30 hours per week and she was earning $195 per week.

5. On July 25, 1996, while working at the Wichita Clinic, claimant reinjured her back as she bent over to pick up x-ray folders and placed them in a cart. Claimant testified that after this incident the symptoms returned to what they were before the incident. She also testified that the condition of her back had not changed on any permanent basis since her release from Dr. VinZant.

6. After the July 1996 injury, claimant received treatment first from Dr. Daniel V. Lygrisse and then from Dr. Douglas T. Davidson. When asked if he had an opinion as to whether claimant suffered a permanent injury from the July 1996 incident, Dr. Lygrisse answered that

he did not. Dr. Davidson testified from his records that claimant has no permanent impairment, but he believed this referred to the July 1996 incident.

7. Dr. VinZant reviewed a list of tasks claimant had preformed in the work she did during the fifteen years before the accident. The list was prepared by Mr. Jerry D. Hardin, an employment expert. Dr. VinZant acknowledged that he had never given permanent restrictions but indicates she would need permanent restrictions. He hesitated to state specifically what the restrictions would be without seeing her again. He was willing to, and did, testify to certain of the tasks which, in his opinion, she could not perform. He identified one of ten tasks in her work for respondent, the task of lifting and moving boxes weighing as much as 40 pounds. From her job with Learjet, he identified two of five tasks claimant can no longer perform. Finally, he identified one of three tasks in her work for Fruhauf Uniforms. He ruled out 4 of the total of 18 tasks, or 22 percent.[1] Mr. Hardin had ruled out one more task in the job with Learjet, but Dr. VinZant stated only that this one was questionable.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board finds claimant has proven that she suffered permanent injury by accident arising out of and in the course of her employment with respondent. Claimant's testimony and the testimony of Dr. VinZant support this conclusion. Respondent has argued that because of the accident in July 1996, while claimant was working for another employer, claimant has not met her burden of proving the permanent injury resulted from the accident while working for respondent. But the medical testimony from the two treating physicians, Dr. Davidson and Dr. Lygrisse, does not contradict claimant's testimony relating her injury to the accident at issue here. Neither of these two physicians offer an opinion that claimant suffered permanent injury in July 1996.

3. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

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[1] After identifying the 4 tasks, Dr. VinZant was asked in summary if there were 5 of the 18 she could not do and Dr. VinZant agreed. It appears these were the numbers the ALJ used to arrive at the 28 percent task loss she used. The Board has chosen to rely on the specific testimony about the tasks as it appears to more accurately reflect the doctor's opinion.

4. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. The Board concludes claimant is entitled to a work disability. Claimant is not actually earning as much as 90 percent of her preinjury wage and the Board does not consider it appropriate under the circumstances of this case to impute a wage of 90 percent or more.

Respondent gives two reasons for imputing a wage. First, respondent contends no permanent restrictions were imposed. As the Board has above found, Dr. VinZant did not impose permanent restrictions, but testified claimant does need restrictions. Dr. VinZant also gave his opinion on which of the tasks claimant cannot now perform. The Board finds his opinion satisfies the requirement in K.S.A. 44-510e that the task loss is "in the opinion of the physician."

Second, respondent contends claimant is not entitled to a work disability because she was terminated for cause. For several reasons, this factor does not, in the Board's view, limit the claimant to disability based on functional impairment. First, Dr. VinZant's opinion on tasks indicates claimant cannot now do all the tasks she was doing in the job for respondent. Absent some accommodation, she could not have continued to earn the wage she was earning with respondent. Second, the Board has concluded that while termination for post-injury conduct may eliminate work disability, termination for preinjury misconduct does not. *Ramirez v. Excel Corporation*, Docket No. 198,826 (January 1998). The rationale for this distinction is that preinjury misconduct is not generally a means of manipulating the amount of benefits and for that reason does not raise the issues addressed in the *Foulk* and *Copeland* decisions. Finally, the Board notes the reason for claimant's termination does not suggest bad faith on claimant's part. It was not a termination for conduct equivalent to failing to try to find employment or refusing to accept accommodated employment.

7. The Board finds claimant has a 22 percent loss of ability to perform tasks she performed in the fifteen years of work before this injury. This conclusion is from the opinion of Dr. VinZant.

8. The Board finds claimant has a 42 percent wage loss. This conclusion is reached by comparing claimant's current wage of $195 per week to her wage at the time of the injury which the parties stipulated was $333.48.

9. Claimant has a 32 percent work disability. K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on February 16, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Alice M. Sinn, and against the respondent, Trans Union, and its insurance carrier, Sedgwick James of Missouri, Inc., for an accidental injury which occurred April 7, 1995, and based upon an average weekly wage of $333.48, for 11.71 weeks of temporary total disability compensation at the rate of $222.33 per week, or $2,603.48, followed by 132.8 weeks at the rate of $222.33 per week, or $29,525.42, for a 32% permanent partial disability, making a total award of $32,128.90, which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Kirby A. Vernon, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director